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**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF NEVADA**

In re:

USA COMMERCIAL MORTGAGE  
COMPANY,

USA CAPITAL REALTY ADVISORS,  
LLC,<sup>1</sup>

USA CAPITAL DIVERSIFIED TRUST  
DEED FUND, LLC,

USA CAPITAL FIRST TRUST DEED  
FUND, LLC,<sup>2</sup>

USA SECURITIES, LLC,<sup>3</sup>  
Debtors.

**Affects:**

- ☐ All Debtors  
☒ USA Commercial Mortgage Company  
☐ USA Capital Realty Advisors, LLC  
☐ USA Capital Diversified Trust Deed Fund, LLC  
☐ USA Capital First Trust Deed Fund, LLC  
☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR  
Case No. BK-S-06-10726-LBR<sup>1</sup>  
Case No. BK-S-06-10727-LBR  
Case No. BK-S-06-10728-LBR<sup>2</sup>  
Case No. BK-S-06-10729-LBR<sup>3</sup>

**CHAPTER 11**

Jointly Administered Under Case No.  
BK-S-06-10725 LBR

**SECOND OMNIBUS OBJECTION  
OF USACM TRUST TO PROOFS OF  
CLAIM BASED IN WHOLE OR IN  
PART UPON INVESTMENT IN THE  
SHAMROCK TOWER LP LOAN**

Date of Hearing: November 13, 2009  
Time of Hearing: 9:30 a.m.

The USACM Liquidating Trust (the "USACM Trust") moves this Court, pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an order disallowing the Proofs of Claim filed by individual investors ("Direct Lenders")

<sup>1</sup> This bankruptcy case was closed on September 23, 2008.

<sup>2</sup> This bankruptcy case was closed on October 12, 2007.

<sup>3</sup> This bankruptcy case was closed on December 21, 2007.

1 against USA Commercial Mortgage Company (“USACM”) to the extent such claims are  
2 based upon an investment in the Shamrock Tower LP Loan (the “Shamrock Loan”). This  
3 Objection is supported by the Court’s record and the Declaration of Geoffrey L. Berman in  
4 Support of Omnibus Objections to Proofs of Claim Based Upon the Investment in the  
5 Shamrock Loan and filed with the Court today (the “Berman Decl.”).

## 6 **MEMORANDUM OF POINTS AND AUTHORITIES**

### 7 **I. BACKGROUND**

8 On April 13, 2006 (“Petition Date”), USA Commercial Mortgage Company  
9 (“USACM”), USA Securities, LLC, USA Capital Realty Advisors, LLC, USA Capital  
10 Diversified Trust Deed Fund, LLC, and USA Capital First Trust Deed Fund, LLC  
11 (collectively, the “Debtors”), filed voluntary petitions for relief under chapter 11 of the  
12 Bankruptcy Code. Debtors continued to operate their businesses, if any, as debtors-in-  
13 possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Debtors’ post-  
14 petition management of the Debtors was under the direction of Thomas J. Allison of  
15 Mesirow Financial Interim Management, LLC (“Mesirow”), who served as the Chief  
16 Restructuring Officer.

17 USACM is a Nevada corporation that, prior to the Petition Date, was in the  
18 business of underwriting, originating, brokering, funding and servicing commercial loans  
19 primarily secured by real estate, both on behalf of investors and for its own account.

20 That business included the solicitation of individual investors to purchase fractional  
21 interest in loans that USACM originated and then serviced. These investors, totaling  
22 approximately 3,600 as of the Petition Date, are referred to as “Direct Lenders” in  
23 USACM’s bankruptcy case and in this Objection.

24 On September 14, 2006, the Court entered its Order Setting Deadline to File Proofs  
25 of Claim and Proofs of Interest [Docket No. 1280] (the “Bar Date Order”). The Bar Date  
26

Order established 5:00 p.m., prevailing Pacific Time, on November 13, 2006, as the deadline (“Bar Date”) for creditors to file proof of claims.

On September 25, 2006, Debtors served a copy of the Bar Date Order on their service lists [Docket No. 1358]. All Creditors were served with a copy of the Bar Date order as well [Docket No. 1358].

On November 6, 2006, a stipulation was filed and an order entered extending the Bar Date for Direct Lenders only to file proofs of claim until January 13, 2007 [Docket No. 1729].

On January 8, 2007, this Court entered its Order Confirming the “Debtors’ Third Amended Joint Chapter 11 Plan of Reorganization” as Modified Herein [Docket No. 2376] (the “Confirmation Order”).

As part of the Plan, USACM sold the servicing rights to most of the loans it serviced to Compass Financial Partners, LLC, (“Compass”) including the Shamrock Loan. The sale to Compass Financial Partners closed on February 16, 2007.

Under the Plan, the USACM Trust is the successor to USACM with respect to standing to seek allowance and disallowance of Claims.

On information and belief, Silar Advisors (“Silar”) alleges that it foreclosed on its loan(s) to Compass Financial Partners in September 2008 and alleges that it has become the successor servicer to the Shamrock Loan and the Direct Lenders thereto.

Under the Plan, unsecured claims of Direct Lenders against USACM are classified in Class A-5. Allowed Unsecured Claims “shall receive a beneficial interest in the USACM Trust, and on account of their Allowed Claim may receive a Pro Rata Share of the assets of the USACM Trust after satisfaction of all Allowed unclassified Claims, Allowed Class A-1, A-2, and A-3 Claims, and all post-Effective Date fees, costs, and expenses of implementation of the USACM Plan for USACM and the USACM Trust.”

1 The USACM Trust exists as of the Effective Date of the Plan, which was March 12,  
2 2007. Geoffrey L. Berman is the Trustee.

3 **Exhibit A** attached lists Proofs of Claim filed by Direct Lenders that appear to be  
4 based IN PART upon an investment in the Shamrock Loan. (Berman Decl. ¶ 7.) **Exhibit**  
5 **A** identifies the Proof of Claim number, the claimant, the claimant's address, the total  
6 amount of the claim and the total amount of the claim that appears to be related to an  
7 investment in the Shamrock Loan based upon the information provided by the claimant.  
8 (Berman Decl. ¶ 7.) The claims listed in **Exhibit A** are referred to hereafter as the  
9 Shamrock Claims.

## 10 **II. JURISDICTION**

11 The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and  
12 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core  
13 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

14 The statutory predicates for the relief requested herein are 11 U.S.C. § 502 and  
15 Bankruptcy Rule 3007.

## 16 **III. APPLICABLE AUTHORITY**

17 Under the Bankruptcy Code, any Claim for which a proof of claim has been filed  
18 will be allowed unless a party in interest objects. If a party in interest objects to the proof  
19 of claim, the Court, after notice and hearing, shall determine the amount of the Claim and  
20 shall allow the Claim except to the extent that the Claim is "unenforceable against the  
21 debtor . . . under any . . . applicable law for a reason other than because such claim is  
22 contingent or unmatured." 11 U.S.C. § 502(b).

23 The USACM Trust is entitled to object to proofs of claim under 11 U.S.C. § 502(a).  
24 This objection is timely under the confirmed Plan, as the deadline for such objections has  
25 been extended to October 7, 2009, by this Court's orders.  
26

1 A properly filed proof of claim is presumed valid under Bankruptcy Rule 3001(f).  
2 However, once an objection to the proof of claim controverts the presumption, the creditor  
3 ultimately bears the burden of persuasion as to the validity and amount of the claim. *See*  
4 *Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R.  
5 222, 226 (B.A.P. 9th Cir. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996). The ultimate burden  
6 of proof as to the validity of a proof of claim “remains at all times upon the claimant.”  
7 *Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1039 (9th Cir.  
8 2000).

#### 9 IV. THE SHAMROCK LOAN DIRECT LENDERS

10 On June 30, 2003, 619 Main, LP made and delivered to Western United Life  
11 Assurance Company, a Promissory Note in an amount of \$9,262,500 (the “Note”). On  
12 July 29, 2004, the Shamrock Direct Lenders, including the Direct Lenders identified in  
13 **Exhibit A** attached, purchased the Note through USACM. Through subsequent  
14 amendments, the loan was ultimately increased to \$10,500,000. (Berman Decl. ¶ 2.)

15 The Loan was secured by a first Deed of Trust (“Deed of Trust”) on real property  
16 and improvements thereon, as described in the Deed of Trust. The Deed of Trust was  
17 recorded on July 7, 2003 under Clerk’s File Number W811419 in the Official Public  
18 Records of Real Property of Harris County, Texas. (Berman Decl. ¶ 3.)

19 Upon information and belief, 619 Main, LP subsequently transferred title to the  
20 collateral defined in the Deed of Trust to Shamrock Tower LP. (Berman Decl. ¶ 4.)

21 Based upon available appraisals, the Shamrock Loan appears to have been fully  
22 secured when the Direct Lenders made the Loan and when USACM’s servicing rights  
23 were sold to Compass.

24 A March 31, 2004 appraisal by Luedemann & Associates appraised the value of the  
25 property securing the Shamrock Loan at an approximate value of \$16,215,350 as of March  
26 14, 2004. (Berman Decl. ¶ 5.)

1 A May 15, 2006 appraisal by Hilco Real Estate Appraisal, LLC estimated the value  
2 of the collateral at \$14,500,000 as of June 5, 2006. (Berman Decl. ¶ 6.)

3 Based on information provided by Windemere Capital, the sub-servicer for the  
4 Shamrock Loan, since the servicing rights for the Shamrock Loan were transferred to  
5 Compass, it appears that a resolution was reached with the borrower whereby the Direct  
6 Lenders took title to the collateral and the collateral was sold to a third-party for  
7 approximately \$15,000,000. On information and belief, there is ongoing litigation  
8 between Silar and the Direct Lenders in United States District Court, District of Nevada,  
9 over the proper amount of Silar's recovery for fees, default interest and other charges.  
10 Upon information and belief, amounts over which there was no dispute were distributed to  
11 the Direct Lenders. Upon information and belief, the Direct Lenders have not yet been  
12 paid in full.

### 13 **V. OBJECTIONS**

14 The Direct Lenders fail to state a claim as the Direct Lenders were not damaged by  
15 USACM's conduct. Ultimately, the sale of the collateral yielded sufficient proceeds to  
16 cover the principal owed to the Direct Lenders. USACM is not responsible for Silar's  
17 conduct.

18 Even if the loan was not performing, the Direct Lenders fail to state a claim as the  
19 Direct Lenders have not been damaged by USACM's conduct because the Shamrock Loan  
20 appears to have been fully secured at the time the Direct Lenders funded the Shamrock  
21 Loan, and when USACM sold the servicing rights to Compass. Also, the USACM Trust  
22 is not aware of any information that suggests the Shamrock Loan was anything other than  
23 an arms-length transaction.

24 The USACM Trust is not aware of any breach of the service agreement by  
25 USACM. To the extent the property's value has dropped since USACM sold the servicing  
26

1 rights pursuant to the Plan of Reorganization, USACM is no longer a party to any  
2 servicing contract and consequently has no rights, duties, or obligations thereunder.

3 USACM did not guarantee repayment of the Shamrock Loan to the Direct Lenders.  
4 The Direct Lenders took a risk by funding the loan. USACM is not liable for the  
5 Borrower's default or any decrease in the value of the collateral caused by the downturn in  
6 the real estate market.

7 **VI. CONCLUSION**

8 The USACM Trust respectfully requests that the Court disallow the claims listed in  
9 **Exhibit A** to the extent they are based upon a Direct Lender investment in the Shamrock  
10 Loan. This objection will not affect these claims to the extent they are based upon  
11 investments in other loans. The USACM Trust also requests such other and further relief  
12 as is just and proper.

13 DATED this 14th day of October, 2009.

14 LEWIS AND ROCA LLP

15  
16 By /s/ Marvin Ruth (#10979)

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26

1 Copy of the foregoing and pertinent  
2 portion of Exhibit A mailed by first  
3 class postage prepaid U.S. Mail this  
4 14th day of October, 2009,  
5 to all parties listed on Exhibit A  
6 attached.

7 LEWIS AND ROCA LLP

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